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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 656

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

J. M. CORRICK AND L. J. KELEHER, A PARTNERSHIP DOING BUSINESS AS ADAMS, CORRICK & KELEHER, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE APPELLEES.

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INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	4
Summary of Argument	9

ARGUMENT.

The schedule of rates published by the appellees on October 19, 1935 is valid and legally in force	11
Short analysis of petition	11
Appellees filed and posted schedule of October 19, 1935	12
Secretary returned schedule because (1) of pending litigation; and because (2) of previous rate orders	12
Petition prays that Secretary be restrained from enforcing the orders of January 8, 1934 and March 12, 1934	13
Change in economic conditions and volume of live stock, discussed	14
Secretary not justified in refusing schedule because of pending litigation	15

The Packers and Stockyards Act gives to market agencies the primary right to make rates subject to their suspension by the Secretary of Agriculture upon his assigning a reason therefor and deferring the use of such rates until after hearing..... 15

Analysis of provisions of Packers and Stockyards Act..... 16

Section 306(c) provides for changes in rates by filing and publishing schedule upon ten days' notice..... 17

Section 306(e) authorizes Secretary to suspend the schedule for hearing and determination..... 17

Secretary can reject schedule only if it does not give lawful notice of its effective date..... 18

The refusal of the Secretary to retain the schedule was arbitrary and without authority of law.... 18

Rate orders are not *res adjudicata* nor judgments *in rem*..... 19

The Government's construction of the Act would permit market agencies to file a schedule once only..... 19

The provisions of Section 310(a) means that rates prescribed are to be in force until changed in a manner provided by law..... 20

Single provisions or paragraphs of an Act must be construed with the entire Act..... 21

The Packers and Stockyards Act is modeled after the Interstate Commerce Commission Act..... 23

The two acts compared..... 23

Under Interstate Commerce Commission Act carriers are primary rate-makers..... 26

Discussion of cases..... 26

The delegation to the Secretary is to regulate.... 30

The construction of the appellees would not defeat the regulatory power of the Secretary..... 31

The Government's suggestion that a rehearing be applied for was complied with and rebuffed.... 32

If the Secretary believed the new schedule unlawful, the Act provides a method for him to enforce his prior orders 34

The Statutory Court had jurisdiction of this cause... 35

The Government did not contest jurisdiction below 35

The proceedings in the Statutory Court were brought to enjoin the enforcement of orders..... 35

The Secretary insisted upon compliance with his orders and threatened penalties for violation.. 35

The petition prayed that the Secretary be restrained from enforcing his orders..... 37

The contention of the defendants in the District Court was that the orders should be enforced..... 38

The argument of the Government that the District Court had no jurisdiction does not square with its argument that the new rates are void because contrary to the Secretary's orders 39

The duties of the market agencies in respect to the filing of the schedule were performed upon delivery of the schedule to the Secretary..... 41

The essential thing of a filing is the deposit of the paper with the proper officer with notice of the intent that he should retain it..... 42

The appellees alleged in the petition that the rate schedule was filed 42

The purpose of filing is to give the Secretary notice, which he got 44

The Secretary cannot return or destroy a schedule and then contend he did not get it..... 44

The failure of an officer to perform his ministerial duty when a paper is delivered for filing does not render the filing ineffective 44

The duty of appellees was performed upon the delivery of the schedule to be kept on file and the failure of the Secretary to perform his duty does not prejudice their rights..... 45

Decisions discussed 45

No authority is cited by the Government in opposition to appellee's contention that the refusal of the Secretary to retain the schedule delivered to him for filing was nugatory..... 48

Cases cited by the Government analyzed..... 49

Conclusion 52

Appendix A—Excerpts from Publications of Department of Agriculture 55

Appendix B—Provisions of Packers and Stockyards Act, 1921 63

Appendix C—Provisions of Judicial Code..... 73

Table of Cases.

Abbott Law Dictionary 47

Atchison, Topeka & Santa Fe Ry. Co. v. U. S., 284 U. S. 248 33

Baker v. Reeves, 9 N. J. Misc. 1303 46

Berlin v. Commissioner, 59 F. (2) 996 50

Blair v. Cleveland C. C. & St. L. Ry. Co., 45 F. (2) 792, affirmed 59 F. (2) 478 45

Chapin v. Kingsbury, 135 Mass. 580 51

City of Bluefield v. Public Service Commission, 113 S. E. 745 15

Clear Creek Power & Development Company v. Public Service Commission PUR 1928A, 506 15

In re DeWar, 10 Mont. 426 47

Director General of Railroads v. The Viscose Company, 254 U. S. 498 28

Edwards v. Grand, 121 Cal. 254 47

Edward Sales Co. v. Harris Structural Steel Co., 17 F. (2) 155 50

Gallagher v. Linwood, 30 N. Mex. 211 46

Gove v. Armstrong, 87 Ver. 468 47

In re Gubelman, 10 F. (2) 926 51

Hanover Fire Insurance Company v. Shrader & Rogers, 89 Tex. 35, 33 S. W. 112 46

Harrison v. Clifton, 75 Ia. 736 47

I. C. C. v. L. & N. R. R. Co., 227 U. S. 88 26

I. C. C. v. Union Pacific R. R. Co., 222 U. S. 541 28

Kiser v. Central of Georgia, 236 F. 573 28

Lewis-Hall Iron Works v. Blair, 23 F. (2) 972 51

L. & N. R. R. Co. v. Maxwell, 237 U. S. 94 28

Marlet v. Hinman, 77 Wis. 136 47
Monroe Gas Light & Fuel Co. v. Michigan Public Utilities Co., 292 F. 139 15
Mosel v. San Antonio & A. P. Ry. Co., 249 S. W. 893, 177 S. W. 1048, 180 S. W. 1138, 195 S. W. 621 15
Re New York Tel. Co. (#6177 N. Y. Public Service Commission) 15
New York Telephone Company v. Prendergast, 36 F. (2) 54 15
Norris v. Cross, 25 Okl. 287 47
Penn. R. R. Co. v. International Coal Mining Co., 230 U. S. 184 28
Penn. R. R. Co. v. Titus, 216 N. Y. 17 28
Pollard v. Bailey, 87 U. S. 520 ..... 22, 31
Pool v. Poindexter, 72 Kas. 654 47
Rogers v. Peck, 199 U. S. 425 30
Second Employers' Liability Cases, 223 U. S. 1 30
Skinner & Eddy Corp. v. United States, 249 U. S. 557 .26, 28
Spackman v. Gross, 25 S. Dak. 244 47
Tagg Bros. v. United States, 280 U. S. 420 ..... 19, 30, 32
U. S. v. Commerford, 64 F. (2) 28 50
United States v. Coombs, 37 U. S. 72 31
United States v. Davidson, 285 F. 661 50
U. S. v. Hill, Warden, 8 F. Supp. 469 50
United States v. Illinois Central R. R., 263 U. S. 515 .. 27
United States v. Lombardo, 241 U. S. 73 ..... 49, 50
United States v. Van Duzee, 185 U. S. 278 50
Re Von Borcke, 94 F. 352 45
Wampler v. Snyder, Marshall, 66 F. (2) 195 50
Yates v. Tatum, 60 Colo. 484 46

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BRIEF FOR THE APPELLEES.

OPINION BELOW.

The opinion of the statutory court (R. 23-24) is not reported. The Findings of Fact and Conclusions of Law of the specially constituted court appear in the record at pages 24-28.

JURISDICTION.

The order for interlocutory injunction was entered December 3, 1935 (R. 28-30). Petition for appeal was allowed December 18, 1935 (R. 32-33). A direct appeal is allowed to the Supreme Court by Section 47, Title 28 U. S. Code, a part of the Urgent Deficiencies Appropriation Act of October 22, 1913 c. 32, 38 Stat. at L. 208, 219.

QUESTIONS PRESENTED.

The questions presented are:

1. Whether under the Packers and Stockyards Act, market agencies have the power and right to initiate rates subject to the regulatory power of the Secretary of Agriculture.

2. Whether upon the filing of a new schedule of rates with the Secretary of Agriculture and his refusal to retain it but without suspending the operation of the schedule and instead insisting upon the enforcement of a prior rate order and threatening prosecution for violation of such order, a Statutory Court, having jurisdiction over the parties, has jurisdiction to entertain a suit to restrain the Secretary from enforcing the order with which he demands compliance.

3. Whether an administrative officer has the power to refuse to retain a paper duly delivered to and filed with him and then assert that the document can be of no effect because it was not filed.

The Government below did not question the filing of the schedule of October 19, 1935 nor do the assignments of errors raise the question of fact of filing. Out of an

abundance of caution, however, this brief will discuss the question.

STATUTES INVOLVED.

The statutes involved are the Packers and Stockyards Act, 1921, and those statutes relating to the jurisdiction of the Statutory Court and this Court. The Packers and Stockyards Act is set forth herein as Appendix B. The provisions of law relating to jurisdiction and appeal are set forth herein as Appendix C.

STATEMENT OF THE CASE.

The appellees are market agencies engaged in the buying and selling of live stock on a commission basis at the Union Stock Yards in Chicago. They are, with few exceptions, the same persons who are appellants in *C. H. Acker, et al.*, v. *United States, et al.*, No. 655 (R. 5, 6).

On January 8, 1934, the Secretary of Agriculture entered a rate order for the Chicago market (R. 5). This order was entered pursuant to a hearing had in 1933 upon an investigation of costs, volume of business and receipts for the years 1931 and 1932 (R. 6). After the denial of a petition for rehearing, the schedule of rates and charges of the January 8 order was slightly modified by an order entered March 12, 1934 (R. 5). On April 9, 1934, a second petition for rehearing was filed which was denied three days later (R. 5).

The market agencies then sought judicial review in the case of *C. H. Acker, et al.* v. *United States of America, et al.*, now No. 655, October Term, 1935, in this court (R. 5). In that suit the District Court ordered a preliminary injunction on April 19, 1934. On final hearing, the court below dismissed the complaint and allowed an appeal to this court (R. 5).

The petition alleges that subsequent to 1931 and 1932, the years investigated, subsequent to the orders of the Secretary, and subsequent to the hearing and decree in the District Court, the receipts of live stock of the appellee decreased in volume until, for example, during August, 1935, the receipts were the lowest of any August since the year 1882 (R. 6). It is further alleged that changed economic conditions, decrease in volume of live stock, and decreased volume of receipts had caused such losses and

hardship that the appellees filed and, published a new schedule of rates effective November 1, 1935 (R. 6).

It is contended that the provisions of the Packers and Stockyards Act authorize market agencies to initiate a new rate schedule or structure by filing and posting such schedule in compliance with the terms of the Act, and that when such schedule is filed and posted in advance of its effective date, the rates in such schedule become effective upon the day indicated in the schedule, unless the Secretary, in the meantime, suspends the proposed schedule for a limited period of time, upon assigning a reason for such suspension, in order that a full hearing and determination may be had of the reasonableness of the rates and charges contained in the schedule (R. 8, 9).

Before the schedule in question herein was filed, the appellee by their representative had conferred with the Department of Agriculture and were informed that the Department was sympathetic with the condition of the commission men and their business but that nothing could be done because litigation was pending (the *Acker* case) to determine the validity of the orders of the Secretary of January 8, 1934 and March 12, 1934. (R. 6, 7, 8, letters of September 23, 1935 and September 30, 1935).

The Department of Agriculture stated

> "that the commission rate situation at the Chicago market should not be disturbed pending the determination of the suit brought by the market agencies to test the validity of the Secretary's order prescribing reasonable rates and charges for their services at that market" (R. 8).

Being unable to obtain administrative relief, the appellees prepared, posted, published, and delivered to the Secretary of Agriculture a new schedule of rates superseding previous tariffs, the schedule bearing publication date October 19, 1935, and the effective date of November 1, 1935

(R. 9). The schedule in question appears as Exhibit A to the petition (R. 13).

The delivery of the schedule in question to the Secretary of Agriculture was acknowledged by him by letter dated October 26, 1935. In this letter the Secretary called attention to his orders of January 8, 1934 and March 12, 1934 in Bureau of Animal Industry Docket No. 402; to the petitions for rehearing which had been filed and denied; and to the severe penalties for violation of his orders. The letter then states:

> "The Secretary will insist upon compliance with his orders" (R. 10).

The schedule which had been delivered to the Department of Agriculture was returned with the letter of October 26, 1935 with the following comments:

> "The Department administratively construes the Packers and Stockyards Act, 1921, to mean that once the Secretary, in compliance with the Act, has prescribed a schedule of rates and charges for a particular market, no change in those rates and charges can be made except by the Secretary or by a court of competent jurisdiction in a proper proceeding. The mere proffer to file a new schedule of different rates and charges does not require the Secretary to receive and file such schedule.
>
> The schedule is also rejected because of pending litigation involving the validity of the above-mentioned orders. The market agencies sought to enjoin the enforcement of those orders by suit filed in a Federal District Court of three judges. The court, on December 31, 1934, sustained the orders. The market agencies have taken steps to appeal the case to the Supreme Court of the United States. It is not deemed wise to receive and file the proposed new schedule of rates and charges which are in conflict with those found by the court to be fair to the market agencies." (R. 10)

The appellees before the effective date of the schedule in question, filed on October 31, 1935, their petition setting

forth the facts, as stated herein, and praying among other things

> "That upon the filing of this petition and bill and the convening of a properly constituted Court, that the Court grant an interlocutory injunction restraining and enjoining the defendants, and each of them, from enforcing or threatening to enforce the Orders of the Secretary of Agriculture in Bureau of Animal Industry Docket 402; and from interfering in any manner, civil or criminal, with the collection of rates and charges specified in the schedule or tariff attached as Exhibit A to this petition and complaint, and from threatening to interfere with the collection of the rates and charges specified in such schedule, and enjoining and restraining the Secretary of Agriculture from suspending the registration of any of the petitioners and plaintiffs because of his or its collection of the rates and charges in such schedule,—all until the further order of the Court;" (R. 13)

Not a single allegation in the petition has been or is now denied by the Government. Its defense to the application for preliminary injunction was on the question of whether the market agencies had the right and power, under the Packers and Stockyards Act to initiate a new rate schedule subject to the regulative powers of the Secretary under the Act.

The application for interlocutory injunction was allowed and order entered December 3, 1935 (R. 28). The *per curiam* opinion of the District Court appears at page 23 of the Record and its Findings of Fact and Conclusions of Law immediately follow the opinion. The Conclusions of Law of the Statutory Court held that the rejection by the Secretary of Agriculture of the schedule of rates and charges tendered to him was unreasonable and arbitrary and without authority of law and that the Secretary could not by arbitrarily refusing to file the tendered schedule, render unlawful and ineffective the schedule of rates and charges therein (R. 27, 28).

Upon the merits of the controversy, the Court concluded:

> "The fact that the Secretary of Agriculture had previously acted to fix rates and charges of these market agencies does not thereafter deprive the market agencies of the right to initiate and file lawful rates for their services in the manner provided by the Packers and Stockyards Act, which thereupon become the lawful rates, subject to their suspension by the Secretary of Agriculture, and to being superseded by the Secretary, in manner and form as in said Packers and Stockyards Act provided." (R. 27)

SUMMARY OF ARGUMENT.

I.

The schedule of rates published and posted by the appellees and delivered to the Secretary for filing on October 19, 1935 to be effective November 1, 1935 is valid and legally in force. The Packers and Stockyards Act gives to market agencies the right to make rates subject to their suspension by the Secretary of Agriculture, upon his assigning a reason therefor and deferring the use of such rates until after hearing. After a hearing and determination, the Secretary may permanently supersede the rates initiated by the market agencies. If the Secretary does not suspend a schedule of rates duly filed, published and posted, such schedule goes into effect by operation of law upon its effective date.

The Packers and Stockyards Act is modeled after the Interstate Commerce Commission Act which has been interpreted by this court in accordance with the construction contended for the Packers and Stockyards Act.

The fact that the Secretary of Agriculture had previously acted to fix rates and charges of the market agencies does not thereafter deprive them of the right to initiate and file lawful rates for their services in the manner provided by the Packers and Stockyards Act which thereupon become the lawful rates subject to their suspension by the Secretary of Agriculture and to being superseded by the Secretary in manner and form as in the Packers and Stockyards Act provided.

II.

The Statutory Court had jurisdiction of this cause. The proceedings were brought to enjoin orders of the Secretary of Agriculture. The Secretary insisted upon compliance with his orders of January 8, 1934 and March 12, 1934 and threatened penalties for violations. The injunctional order of the statutory court prevents the enforcement of those orders.

III.

The duties of the market agencies in respect to the filing of the schedule of October 19, 1935, were performed upon the delivery of such schedule to the Secretary to be kept on file. The requirement of the Packers and Stockyards Act that rates be filed with the Secretary is to give that officer notice. This he got. He could not, by refusing to retain the schedule, prejudice the rights of the appellees who had done all in their power fully to comply with the Act.

The essential thing to a filing is the deposit of a paper or document with the proper officer with notice of the purpose and intent that he should retain it. The failure of the officer to perform his duty when a paper is delivered for filing does not render the filing ineffective. The Secretary could not refuse the schedule and then say it was not filed.

ARGUMENT.

I.

THE SCHEDULE OF RATES PUBLISHED BY THE APPELLEES ON OCTOBER 19, 1935, TO BE EFFECTIVE NOVEMBER 1, 1935, IS VALID AND LEGALLY IN FORCE.

Before discussing argumentatively the proposition stated above, reference is made to the petition filed in the District Court. The petition alleges (R. 5) that in September, 1932, the Secretary of Agriculture entered an order of inquiry and notice of hearing against the market agencies at Chicago Union Stock Yards for the purpose of determining the lawfulness and reasonableness of the rates and charges of the petitioners (appellees); that hearings were had; that on January 8, 1934, the Secretary issued an order containing a schedule of purported reasonable rates and charges; that after the denial of a petition for rehearing a supplementary order of March 12, 1934, was entered, modifying the prescribed rates by some extent; that on April 12, 1934, a second petition for rehearing was denied.

The petition then sets forth the proceedings in the case of *C. H. Acker, et al.* v. *United States of America, et al.*, now No. 655, October term, 1935 in this court. In the *Acker* case, a motion for a preliminary injunction restraining the enforcement of the orders of January 8, 1934 and March 12, 1934 was allowed. Upon final hearing, the District Court on March 19, 1935, entered a decree dismissing the complaint in the *Acker* case. An appeal brought the suit to this court.

It is further alleged in the petition (R. 6) that the rates and charges prescribed by the Secretary in his orders were the result of an investigation of costs, volume of business,

and receipts for the years 1931 and 1932; and that subsequent to those years, subsequent to the orders of the Secretary, and subsequent to the hearing and decree of the District Court the receipts of live stock by the petitioners had decreased in volume and that changed economic conditions and decreased volume of receipts had created such hardship and caused such loses that the petitioners (appellees) were compelled in self-preservation to file the schedule of rates and charges now in litigation.

Further the petition alleges (R. 6, 7, & 8) that before the schedule was filed with the Secretary of Agriculture representatives of the market agencies had conferred with the Department of Agriculture and had been advised that the Department was sympathetic but could do nothing because of the pendency of the *Acker* case to test the validity of the Secretary's orders.

The petition recites (R. 8) the preparation, filing, and posting of the schedule of October 19, 1935 in accordance with the provisions of the Packers and Stockyards Act, 1921; that the Secretary (R. 9 & 10) refused to retain the schedule which had been delivered to him but returned it with the comments

> (1) "that once the Secretary, in compliance with the Act, has prescribed a schedule of rates and charges for a particular market, no change in those rates and charges can be made except by the Secretary or by a court of competent jurisdiction in a proper proceeding"; and
>
> (2) "The schedule is also rejected because of pending litigation involving the validity of the above-mentioned orders (the orders of January 8, 1934 and March 12, 1934 in Bureau of Animal Industry Docket 402)".

Further the allegations are made (R. 11) of full compliance in the preparation, filing, and posting of the schedule of October 19, 1935, with Packers and Stockyards Act and

the General Rules and Regulations of the Secretary of Agriculture thereunder; that the refusal of the Secretary to retain the schedule tendered to him was a nugatory act; that it was the duty of the Secretary if he believed the rates and charges contained in this schedule to be unjust, unreasonable, or discriminatory to at once suspend such schedule, as provided by the Act, in order that a hearing and a determination might be made whether such rates and charges were just, reasonable, and non-discriminatory.

The petition then alleges (R. 11-12) that the schedule of October 19, 1935, was effective on November 1, 1935, and that if the rates of such schedule were not collected the petitioners would be subjected to penalties; and that on the other hand the Secretary threatened prosecution for failure to obey his previous orders.

The prayer is then made (R. 12) that a preliminary injunction issue restraining the defendants from enforcing or threatening to enforce the orders of the Secretary of Agriculture in Bureau of Animal Industry Docket 402 and from interfering with the collection of rates and charges specified in the schedule of October 19, 1935. The schedule appears in the printed record beginning at page 13. The concrete and specific facts in reference to its preparation, posting and filing are found in the affidavit of E. M. Hughes (R. 18), and are not denied except that the Government now contends that the schedule was not filed with the Secretary because he sent it back.

It is upon this state of facts that the Government contends that the schedule of October 19, 1935 is illegal and void. No denial is made by the Government of the facts alleged in the petition. The Government in the court below and in this court stands solely on propositions of law drawn as conclusions applicable to the ultimate acts set forth in the petition.

One of the ultimate facts alleged in the petition (R. 6) is the decrease in volume of live stock handled by the market agencies, and that rates which might have been adequate for the years 1931 and 1932 were inadequate when the new schedule was filed. In support of the allegation of changed economic conditions and decrease in volume, we have added to this brief as Appendix A excerpts from publications of the Department of Agriculture showing among other things:

1. The aggregate supply of meat animals on farms at the beginning of 1936 was the smallest in more than thirty years;

2. The number of hogs on farms at the beginning of 1935 was the smallest in fifty years;

3. The number of cattle at the beginning of 1935 was 7,600,000 smaller than at the beginning of 1934;

4. Hog production in 1933 and 1934 was the smallest in many years;

5. Sheep numbers on January 1, 1935 were the smallest since 1929;

6. The year 1934-35 shows the smallest slaughter of hogs in twenty-five years and that for the year 1935-36 the number of hogs sold for slaughter will be even smaller;

7. Because no such reduction, either in numbers or in percentages, has ever before taken place, the Department is unable to predict how rapidly a recovery can be made;

8. The decrease in cattle supplies which would normally have extended over a five-year period from 1936 to 1940 occurred in a single year in 1934;

9. The 1935 lamb crop in the Western sheep States was the smallest since 1927.

The Secretary's attempted justification in returning the schedule of October 19, 1935 to the market agencies was

(1) because of pending litigation involving the validity of his orders in the *Acker* case; and

(2) because he contended, as stated in his letter of October 26, 1935 (R. 10), that once the Secretary has prescribed a schedule of rates and charges for a particular market no change in those rates and charges can be made except by the Secretary or by a court of competent jurisdiction.

The first alleged justification is so lacking in merit that it was not mentioned by the Government below and is not referred to in the Government's brief in this court. We cite in a footnote on this page several cases showing the lack of merit in the first alleged justification of the Secretary.*

The Packers and Stockyards Act, 1921, gives to market agencies the primary right to make rates subject to their suspension by the Secretary of Agriculture upon his assigning a reason therefor and deferring the use of such rates until after hearing.

The second alleged justification of the Secretary in returning the schedule of October 19, 1935, delivered to and received by him for filing, was

"that once the Secretary, in compliance with the Act,

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* *Monroe Gas Light & Fuel Co.* v. *Michigan Public Utilities Co.*, 292 F. 139; *New York Telephone Company* v. *Prendergast*, 36 F. (2) 54; *Clear Creek Power & Development Company* v. *Public Service Commission*, P. U. R. 1928A, 506 (Colo. Public Utilities Commission (1927); *City of Bluefield* v. *Public Service Commission*, 113 S. E. 745; *Re New York Tel. Co.* (#6177, N. Y. Public Service Commission (May 1, 1930)); *Mosel* v. *San Antonio & A. P. Ry. Co.*; 249 S. W. 893, 177 S. W. 1048, 180 S. W. 1138, 195 S. W. 621 (Texas Civil Appeals (1923)).

From the foregoing cases it appears that an administrative body does not lose jurisdiction to provide a schedule of rates to meet changed and changing conditions. The reasonableness of a rate order can be determined only as of a specified time. The enactments of the Packers and Stock Yards Act provide for changes in rates and put no limitation or condition upon the time or times when such changes may be made, except to provide that there must be proper notice to the interested parties.

> has prescribed a schedule of rates and charges for a particular market, no change in those rates and charges can be made except by the Secretary or by a court of competent jurisdiction in a proper proceeding" (R. 10).

In view of this assertion, it becomes necessary to refer to the Packers and Stockyards Act. (That Act is set forth as Appendix B to this brief and as an appendix in the Government's Brief.)

Section 301 of the Act defines terms used therein. Section 302 provides that when any stockyard comes within the definition given in that section, the Secretary shall

> "give public notice thereof by posting copies of such notice in the stockyard".

Thereafter such stockyard is to remain subject to the provisions of the Act [illegible] contrary notice is given.

Section 303 provides that after the expiration of thirty days from the time the Secretary has given public notice that any stockyard is within the coverage of the Act,

> "no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary".

It is provided in Section 304 that it is the duty of every market agency to furnish, upon reasonable request, without discrimination, reasonable stockyard services; and Section 305 provides that

> "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory".

Section 306(a) provides that within sixty (60) days after the Secretary has given public notice that a stockyard is within the coverage of the Act

> "every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all

rates and charges for the stockyard services furnished by such person at such stockyard."

Sub-section (b) of Section 306 refers to the content and form of such schedules and authorizes the Secretary to prescribe further in respect to such matters and the manner of posting for public notice.

Section 306(c) of the Act provides:

> "No changes shall be made in the rates or charges so filed and published, *except after ten days' notice to the Secretary and to the Public filed and published as aforesaid,* which shall plainly state the changes proposed to be made and the time such changes will go into effect;" (Italics supplied, here as elsewhere herein.)

Section 306(e) provides as follows:

> "*Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may,* either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but *upon reasonable notice, enter upon a hearing* concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon *filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension,* may *suspend the operation of such schedule and defer the use of such rate,* charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect;"

The same subsection further provides that after *full* hearing

> "The Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it (the rate) had become effective".†

† The reference in this subsection to proceedings initiated after the rate had become effective is to Section 310 which provides for investigation and hearing made by the Secretary either upon his own initiative or upon complaint to determine whether rates of any market agency are or will be unjust, unreasonable or discriminatory.

Thus Section 306 gives to the Secretary the discretionary mandate either to suspend a new schedule filed with him and posted in accordance with the Act and his regulations, and enter upon a hearing; or permit the schedule to go into effect by operation of law. He cannot, merely by the refusal to consider a schedule filed, prevent its becoming operative. The Act provides for only one situation in which the Secretary may refuse to file a schedule. This provision is found in Section 306(d) which authorizes the Secretary to

> "reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date".

This provision has no pertinency here.

If the Secretary believed that the market agencies in this case had no right or power to file the schedule of October 19, 1935, his proper course would have been to start proceedings in the District Court in Chicago to enjoin the collection of the rates specified in such schedule. Such action is authorized under Section 315 of the Packers and Stockyards Act to enforce compliance with the Secretary's orders, in this case the orders of January 8 and March 12, 1934.

The Secretary could not reject the schedule under the provisions of 306(d); he did not suspend the operation of a schedule in order to make a determination of the reasonableness of the rates specified therein; he did not commence proceedings to enforce compliance with his orders and enjoin the enforcement of the schedule of October 19, 1935. Instead he took a step, entirely arbitrary and unreasonable, usurping a power that he did not have, and which it is doubtful if Congress could have conferred upon him. Instead of taking either of the courses permitted and authorized, the Secretary, upon his own initiative and without warrant or authority, rejected and refused to keep

the schedule because of pending litigation and because he had once, in the past, prescribed orders for the Chicago yards.

The position of the Government amounts to the contention that orders of an administrative body or a commission affecting charges and rates are judgments *in rem*, such as judgments determining the title to real estate.

Nor are rate orders *res adjudicata*. This court in *Tagg Bros.* v. *United States*, 280 U. S. 420, 445, said:

> "A rate order is not *res judicata*. Every rate order may be superseded by another".

Rate orders obviously can be tested as to validity only as of a specific time. The orders attacked in the *Acker* suit were based upon a hearing had in 1933. The evidence adduced related to the years 1931 and 1932. The question in the *Acker* case is whether or not the rates prescribed by the orders of the Secretary were or were not unreasonable as of the time of the hearing. The question in this suit is of the power of the Secretary to refuse himself to make, and to refuse to allow the market agencies to make, a new rate structure.

If rate schedules could be static things, legislatures themselves could fix rates rather than delegating such duties to an administrative officer or body. The legislatures see the futility of attempting to do that which requires constant attention to fluctuating factors of cost, volume, and revenue.

The argument of the Government is that sub-sections (a), (c), and (e) of Section 306 relate to the procedure for filing rates only in the absence of action by the Secretary. In other words, the contention is that market agencies have the right once, and once only, to initiate rates, that is, within the 60-day period after the Secretary has posted a stockyards as coming within the coverage of the Act.

Further, the Government contends (Brief, p. 28, *et seq.*) that since Section 310(a) which empowers the Secretary to prescribe rates, provides that he

> "May determine and prescribe what will be the just and reasonable rate or charges to be thereafter observed",

therefore a rate order entered by the Secretary must stand forever unless it is charged by the Secretary or set aside by a court.

This argument places an entirely unreasonable construction upon the statute. A rate order may be perfectly reasonable, and upheld by a court as of the time of the hearing, but as this Court has said, a rate order is not *res adjudicata* Conditions may change, volume may decrease, and costs may increase. All of this has happened in this case, emphasizing that a rate good at one time may be either too high or too low in the future. The rule works both ways. Upon the Secretary's construction of the Act, the market agencies would be powerless to file a rate schedule *lowering* rates. Indeed, in the very schedule under question some of the rates are lower than those prescribed by the Secretary and others are no higher. prescribed by the Secretary and others are no higher.*

The words of Section 310(a) that rates prescribed are to be thereafter observed, means that such prescribed rates are to be observed until they are changed in a manner provided by law. And that manner may be either

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Calves.

* The Secretary's rate is 25c per head for consignments of 16 to 30 head. For each head over 20, the appellee's rate is 20c.

Cattle.

In two brackets the charges are the same.

Pigs.

In the bracket 40-50 head the charges are the same.

Hogs.

In the bracket 40-50 head the charges are the same.

Sheep.

In three brackets the rates are the same.

upon the initiation of the Secretary, or as provided in Section 306, upon the initiation of the market agencies themselves.

If new rates are initiated by the market agencies by filing and posting a new schedule, they do not go into effect at once unless the Secretary permits it. He has power to regulate. He can suspend a schedule for a reasonable time to have a hearing; and after a hearing and a determination, he may suspend the proffered schedule permanently. The construction placed upon the Act by the appellees does not take vitality from the Act as the Government contends.

The Secretary's position, on the other hand, is that once he has spoken, no change in rates can be made unless he chooses to speak again,—if ever, and this regardless of changed conditions, great or small. He refused administrative relief because it was against the policy of the Department of Agriculture to change a rate schedule while litigation was in process respecting one of his orders (Letter September 23, 1935, R. 6; letter September 30, 1935, R. 8; letter October 26, 1935, R. 10). He attempts now to refuse to permit the market agencies to initiate a rate as such agencies are authorized to do under the Act. Apparently the Secretary takes the position that his orders affecting rates shall be "like the laws of the Medes and Persians which altereth not".

Single provisions or paragraphs or sentences of an Act must be interpreted and construed by and with the entire Act. Consequently the language of the statute that a rate order prescribed by the Secretary shall continue in effect until his further order, must be considered with the provisions of the entire act which specifically direct that market agencies may file new tariffs, upward or downward, from time to time, subject to the provisions of the Act that the rates so scheduled must be just and reasonable and subject to the supervision of the Secretary to see that they are.

The section of the Act, 313, which provides that an order of the Secretary is in force until his further order, means simply and certainly that before any other rates can be demanded or collected a new schedule must be filed and posted in accordance with the law and with the opportunity to the Secretary to investigate and determine whether such rates so proposed are or are not just and reasonable.

> "The intention of the Legislature, when properly ascertained, must govern in the construction of every statute. For such purpose the whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together."

Pollard v. *Bailey*, 87 U. S. 520, 525.

If the legislature had intended that a schedule of rates and charges was to be once determined and thereafter forever be in force, the legislature itself might well have determined, if it had the power, what those rates would be.

The attempted exercise of power by the Secretary to deny to the appellees their duly filed and posted rate schedule, without affording the hearing provided by the Packers and Stockyards Act, was not only unjust and unreasonable but highly arbitrary. The Act gives the Secretary a discretion when a schedule is filed. He may do one of two things: Permit the schedule to go into effect by operation of law; or suspend it before its effective date so that a hearing can be had. Within these limits of discretion the Act is mandatory, and the Secretary cannot blaze for himself, without a suggestion of authority, a new and third pathway of discretion, namely, an attempted rejection of the schedule and the threat to exact penalties unless the plaintiffs submit to his unwarranted expansion and transgression of the Act under which he exercises any power at all.

The Packers and Stockyards Act is modeled after the Interstate Commerce Commission Act and should receive a like construction.

The Packers and Stockyards Act gives to the Secretary of Agriculture not only powers but duties. Those powers and duties, in respect to the business regulated, are similar to the powers and duties conferred upon the Interstate Commerce Commission by the Act of 1887, the Hepburn Amendment of 1906, and other amendments of less import. Provisions of the statutes relating to enforcement of orders of the Interstate Commerce Commission are made applicable to the Packers and Stockyards Act. (Sec. 316.)

A comparison of the provisions and language of the two Acts makes very clear the powers and duties of the Secretary. In order that the comparative provisions of the respective acts may be the more readily observed, the comparable sections are set opposite each other in the following table:

PACKERS AND STOCKYARDS ACT, 1921.	INTERSTATE COMMERCE COMMISSION ACT.
Section 207(a) Title 7, U. S. Code.	Section 6 (1) Title 49, U. S. Code.
The stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges * * *.	Every common carrier subject to the provisions of this chapter, shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation * * *.
Section 207(c).	Section 6 (3)
No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public, filed and published as aforesaid. * * *.	No change shall be made in the rates, fares and charges * * * which have been filed and published by any common carrier in compliance with the requirements of this Section except after thirty days' notice to the commission and to the public published as aforesaid * * *.

Section 211.

Whenever after full hearing upon a complaint * * * or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative * * *, the Secretary is of the opinion that any rate, charge, regulation or practice of a stockyard owner or market agency, * * * is or will be unjust, unreasonable, or discriminatory, the Secretary (a) may determine and prescribe what will be the just and reasonable rate or charge, or rates or charges to be thereafter observed in such case * * *; and (b) may make an order that such owner or operator * * * (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyards services other than the rate or charge so prescribed * * *.

Section 207(e).

Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative, without complaint, at once * * * but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation or practice and pending such hearing and decision thereon, the Secretary upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regula-

Section 15 (1).

Whenever, after full hearing, upon a complaint * * * or after full hearing under an order for investigation and hearing made by the commission on its own initiative * * *, the commission shall be of opinion that any individual, or joint rate, fare, or charge, * * * is or will be unjust or unreasonable, * * * the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, * * * to be thereafter observed in such case, * * * and to make an order that the carrier or carriers * * * shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare or charge so prescribed * * *.

Section 15 (7).

Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, * * * the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, * * * but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, * * *; and pending such hearing and the decision thereon, the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the

tion or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, * * * the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.	use of such rate, fare, charge, * * * but not for a longer period than one hundred twenty days beyond the time when it would otherwise go into effect; and after full hearing * * * the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.
Section 214.	Section 15 (2).
Except as otherwise provided in this chapter all orders of the Secretary * * * other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order and shall continue in force until his further order or for a specified period of time according as is prescribed in the order unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.	Except as otherwise provided in this chapter, all orders of the commission other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.

Under the Interstate Commerce Commission Act as originally enacted, the Commission had no power to prescribe rates and charges. This power was conferred by the Hepburn Act of 1906, amending the original Act. The Hepburn Act empowered the Commission to determine and prescribe rates upon investigation and hearing; and provided that such orders of the Commission should continue in force until its further order or for a specified period of time unless the same should be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

The same provisions in respect to the fixing of rates continuing in force are found in the Packers and Stockyards Act, quoted in the table above.

Even after the amendment in 1906 to the Interstate Com-

merce Act, it has been held repeatedly that the primary rate maker is the carrier. In *I. C. C.* v. *L. & N. R. R. Co.*, 227 U. S. 88, 92, the Court said:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order."

In the instant case, the Secretary undertakes to enforce his mandate without hearing any evidence.

The Government in the case just cited contended that the finding of the Commission was conclusive and could not be set aside even if the finding was wholly without substantial evidence to support it. To this contention the Court replied, p. 91:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

The condemnation by the Court of the Government's contention in the case quoted from justifiably could be made much stronger had the Commission refused any hearing at all as the Secretary has done here.

In *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557, this

Court summarizes the rate-making powers under the Interstate Commerce Commission Act. The Court said (pp. 564-565):

"The main contention of plaintiff is that, as the carriers had in 1916 reduced the rate from 80 cents to 65 cents, neither the carriers nor the Commission had power to increase the rate without a prior finding by the Commission upon proper hearing 'that such proposed increase rests upon changed conditions other than the elimination of water competition'; and that no such hearing had been had or finding made.

In construing this provision it is important to bear in mind the limits of the Commission's control over rates. *Neither the Act to Regulate Commerce nor any amendment thereof has taken from the carriers the power which they originally possessed, to initiate rates;* that is, the power, in the first instance, to fix rates or to increase or to reduce them. Legislation of Congress confers now upon the Commission ample powers to prevent by direct action the exaction of excessively high rates. The original act, proceeding upon the common-law rule which prohibits public carriers from charging more than reasonable rates, gave the Commission power to declare illegal one unduly high; but even after such a determination the Commission lacked the power to fix the rate which should be charged. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 184, 196-197; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.,* 167 U. S. 479; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U. S. 144, 161. Effective control was not secured until the Act of 1906 had given to the Commission the power to fix, after such hearing, the rate which should be charged; *Interstate Commerce Commission* v. *Humboldt S. S. Co.,* 224 U. S. 474, 483; and the Act of 1910 had given it power to suspend, during investigation, tariffs for new rates, and placed upon the carrier the burden of proof to establish the reasonableness of the increased rates. *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.,* 236 Fed. Rep. 573."

Again, in *United States* v. *Illinois Central R. R.,* 263 U. S. 515, 522, the Court said:

"A carrier is entitled to initiate rates, and, in this

> connection, to adopt such policy of rate making as to it seems wise." (Citing cases.)

See also *I. C. C.* v. *Union Pac. R. R. Co.*, 222 U. S. 541, 550, in which the court refers to "presumption of right conduct by the carrier as primary rate maker."

A host of cases may be found deciding that a properly filed schedule of rates and charges is the one and only lawful and correct rate. See *Penn. R. R. Co.* v. *Titus*, 216 N. Y. 17, 109 N. E. 857; *Penn. R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, holding that a published tariff, so long as it is in force, has the effect of a statute; *L. & N. R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97, in which it is said:

> "Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge."

If a schedule of rates is duly and properly filed and gives adequate notice to the administrative body and to the public, that rate goes into operation upon the effective date noticed therein unless the administrative body, the Interstate Commerce Commission, or the Secretary, either upon complaint or self-initiation, suspends the schedule and enters upon a hearing. That hearing is not a perfunctory affair. The statute says that it must be a full hearing. This means a hearing as of *now*, and not as of 1931 or 1932.

The power of the Interstate Commerce Commission and its duty to investigate and determine the reasonableness of a proposed schedule is so apparent that it is held to be initially within the exclusive jurisdiction of the Commission. Headed by the Supreme Court, the federal tribunals deny to themselves jurisdiction to suspend or enjoin the operation of a schedule of rates unless the Commission has first heard and determined the complaint against the charges or changes in the schedule. *Director General of Railroads* v. *The Viscose Company*, 254 U. S. 498; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557; *Kiser* v. *Central of Georgia Ry. Co.*, 236 F. 573.

We have shown the similarity, not only in general structure but in specific language, between the Interstate Commerce Commission Act and the Packers and Stockyards Act. It would seem entirely clear from a reading of the Packers and Stockyards Act, without the precedent and help furnished in its construction by the similar Interstate Commerce Commission Act, that market agencies at a stockyards are the primary rate makers and that the Secretary's duty is to see that rates made are not and do not become unjust, unreasonable, or discriminatory.

It will be perceived that the Packers and Stockyards Act contemplates a change in rates either by increase or reduction and provides the conditions therefor. Of what significance is the grant of this privilege if a rate that has been prescribed by an Order of the Secretary is to last forever or until the Secretary chooses to speak again? The fact that market agencies, like common carriers, are given the power to establish rates in the first instance, and the right to change with the manner of such change specified, is irresistable evidence that the filing and posting of a new schedule is not subordinate to and dependent upon the judgment or discretion of the Secretary except after a full hearing. The Secretary cannot, by peremptory order and threat, compel the plaintiffs to follow in the *future,* the extent of which the Secretary himself claims the right to determine, rates that have been determined to have been in the *past* reasonable and just.

The construction contended for the Packers and Stockyards Act by the Secretary would make the Act unconstitutional. It would deprive market agencies of their property without due process of law by imposing upon them unjust and unreasonable rates. It would confer upon the Secretary powers which no administrative body or officer in this country has ever had or ever assumed. The Secretary's construction is entirely unreasonable. Statutes are given a

reasonable construction with a view to make effectual the legislative intent in their enactment. *Rogers* v. *Peck*, 199 U. S. 425, 435.

The construction contended for by the Government, namely, that when a rate order is once entered it can be changed only by the Secretary, regardless of lapse of time or change in conditions, would put the Packers and Stockyards Act beyond the power of Congress to have enacted. The Act was held in *Tagg Bros.* v. *U. S.*, 280 U. S. 420, to be a constitutional exercise of the power of the Federal legislature over interstate commerce. The constitutionality of the Act depends upon Article 1, § 8, Clause 3 of the Constitution, which reads:

> "To regulate commerce with foreign nations, and among the several states, and with Indian tribes."

The delegated power is to regulate; the redelegation to the Secretary of Agriculture is also to regulate. The Supreme Court in *Second Employers' Liability* cases, 223 U. S. 1, defines regulate to mean (p. 47)

> "to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large."

The power demanded for and by the Secretary transcends any power which Congress could or did give him. The authority that he would assume, however well-intended or beneficently exercised in one case, could be injuriously exercised in another, is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power.

The intent of the legislature is clear both in the Interstate Commerce Commission Act and the Packers and Stockyards Act. The legislature recognizes that in no proper sense is the public a general manager of a business and hence leaves to the regulated business the primary duty and privilege of initiating rates, subject to the supervision

of the Commission or the Secretary. The cases cited show that the intention of the legislature was clear; it can be properly ascertained; and it must govern in the construction of the statute. *Pollard* v. *Bailey,* 87 U. S. 520, 525. And again, if a section admits of two interpretations, one of which brings it within, and the other of which presses it beyond the constitutional authority of Congress, it is the duty of a court to adopt the former construction. It was so directed by Justice Story, speaking for the Court, in *U. S.* v. *Coombs,* 37 U. S. 72, 76.

The Government expresses fears that the construction of the Packers and Stockyards Act, contended for by the appellees and held by the Statutory Court, will nullify the Act. The Government puts the extreme case that immediately after the Secretary enters an order in respect to a particular market, the market agencies there can defeat the regulatory power of the Secretary by at once filing a new schedule.

The answers to this contention are obvious:

1. The Interstate Commerce Commission Act has not been nullified. On the contrary, the regulative powers conferred therein are extremely effective.

2. The case put by the Government is the extreme, and not the probability. Market agencies will not file, without cause, schedules to bring upon themselves an extensive and expensive hearing.*

3. Market agencies will not file schedules knowing that doing so will be a futile act, as where, since the entry of the Secretary's rate order, there have been no changes in

* The Government's Brief, page 24, recites "the mass of detail involved", "the extensive cost studies", "the voluminous evidence", involved in the task of determining just and reasonable rates. In the *Acker* case there were over forty volumes of testimony, printing a record for judicial review cost over $3,000, the statistical evidence of the market agencies include Exhibit 12, a book of schedules and tables two inches thick and involving months of time and thousands of dollars in preparation. Market agencies will not bring this expense upon themselves without cause.

conditions, costs, volume of business, or other factors influencing costs and income.

The Government, relying upon the *Tagg* Case, 280 U. S. 420 (Brief, p. 32, *et seq.*), says that the remedy of the appellees under the circumstances of which they complain was by rehearing. The answer made to this contention by the Statutory Court was that that is not the method provided by the statute. Further, the appellees had twice applied for rehearings which were promptly denied (R. 5). The conference with the Department of Agriculture recited in the letter of Sept. 23, 1935, (R. 6-7) and the assertion of the Department that it was against its policy to consider any rate change while litigation was pending (R. 10) would have made further petitions for rehearing futile.

Thus the suggestion made in the *Tagg* Case was followed. Moreover the decision in that case make the further suggestion which Government counsel overlook, namely: that (p. 445)

> "the appropriate remedy is to apply for a rehearing before him *or to institute new proceedings*".

The suggestion made in the italicized language above was followed. Judicial review was sought; and the schedule of October 19, 1935 was filed.

The Packers & Stockyards Act provides in Section 309 that complaints may be made to the Secretary by shippers or representatives, official or otherwise, of shippers. The Act further provides that the Secretary may, on his own motion, with or without complaint, institute proceedings in respect to rates. The appellees contend and the District Court found that market agencies may also institute proceedings. If this is not the law, then the only persons who cannot initiate proceedings in respect to rates are the regulated persons. If the market agencies, more vitally interested in rates than anyone else, are to be prevented from initiating any proceeding

in respect to their rates, although others less vitally interested may, an unfair construction is given to the Act. Such could not have been the contemplation of Congress. Stated tritely, it is an unfair rule which does not work both ways.

Judicial review of a rate order is one thing. The establishment of a new rate is another. Judicial review operates only upon *past* facts. A rate order operates in the *future*. This Court may decide that the rates prescribed in the *Acker* Case were reasonable. Such a decision would mean that the rates prescribed in the orders involved in the *Acker* case were reasonable as of the time of the hearing. It does not follow that such rates would be reasonable now or on November 1, 1935, when the new schedule went into effect. This statement is startlingly emphasized in the instant case. At the time the Secretary prescribed his rate orders he did not know and could not foresee the havoc caused by the drought, and the decrease in supplies of livestock, as shown in Appendix "A". And if he realized the effect upon the market agencies by the program of curtailment of production then being embarked upon, he did not give consideration to it.

The Government contends (page 26) that the construction of the Act contended for by the appellees would make it possible for them to defeat the power of the Secretary to regulate rates "without any showing or finding that there had been any change in economic conditions". Such change was alleged in the petition repeatedly. Those allegations have yet to be denied either in the lower court or here, either by answer or otherwise.

In respect to the suggested method of petition for rehearing, the Government refers to *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 284 U. S. 248. When the petition for rehearing was filed in the *Santa Fe* case before

the Interstate Commerce Commission, the case was still in that tribunal. In the instant case the first tribunal, the Secretary, has acted; and a second tribunal (in the *Acker* case) has acted. And the Secretary refused to act further "because of pending litigation" (R. 10)—and this even though he had been advised by brief of the appellees and by the Department of Justice that he could act (R. 7, Folio 13). It was stated:

> "that as a matter of policy the Department would not consider any increase of rates while the litigation is (was) pending" (R. 7, Folio 13).

It is submitted that the market agencies have the power reserved to them in the Packers & Stockyards Act to initiate rates by filing and posting schedules in compliance with the Act; and that when such schedules have been filed and posted, the duty is then cast upon the Secretary by the Act either to suspend the rates contained in such schedules in order for a full hearing and determination; or permit the rates to become effective by operation of law. The Secretary cannot blaze for himself a new path and, by refusing to retain the schedules, exercise a veto power which no other administrative officer has ever attempted to exercise.

If the Secretary and his counsel be correct in their interpretation of the Packers & Stockyards Act, there is a method provided in that Act itself to have prevented the schedule of October 19, 1935, from becoming effective, namely: the institution of a suit in the District Court at Chicago for the enforcement of the Orders of January 8, 1934 and March 12, 1934. It is so provided in Section 315.

II.

THE STATUTORY COURT HAD JURISDICTION OF THIS CAUSE.

It is of significance, first, that the Government, by its belated attempt to challenge the jurisdiction of the Statutory Court, forsakes the position which was taken in that Court, namely, that the Orders of the Secretary of January 8, 1934 and March 12, 1934 were in force and that their enforcement should not be restrained. Below we will refer more fully to the position of the Government in the Statutory Court to prove the assertion just made.

It is of significance, second, that in the Statutory Court, neither by its motion to dismiss nor by brief or argument did the Government challenge the jurisdiction of the Court.

It is of significance, third, that in its assignment of errors (R. P. 30), the Government did not challenge the jurisdiction of the Statutory Court.

It is of significance, fourth, that in the statement of jurisdiction filed in this Court, the question of the jurisdiction of the Statutory Court is not raised.

The Proceedings in the Statutory Court Were Brought "to Enjoin, Set Aside, Annul, or Suspend, in Whole or in Part" an Order of the Secretary of Agriculture.

The appellees filed and published on October 19, 1935, the schedule of rates and charges (R. 13) now being collected at the Chicago Yards pursuant to the provisions of the order for interlocutory injunction of December 3, 1935. In response to the communication transmitting the schedule to the Department of Agriculture, the Secretary replied:

> "It is noted that this schedule sets out rates and charges other than those set forth in the orders issued by the Secretary of Agriculture on January 8, 1934, and March 12, 1934, in B. A. I. Docket No. 402, pre-

> scribing rates and charges for stockyard services on the Chicago Stock Yards. * * * In accordance with the provisions of the Packers and Stockyards Act, 1921, the orders specifically directed that no 'market agency shall publish, demand, or collect any rate or charge for the furnishing of any stockyard service in excess of the rate or charge hereinbefore determined to be just, reasonable, and non-discriminatory for the furnishing of such service.' Severe penalties for violations of such orders are imposed by the act. *The Secretary will insist upon compliance with his orders.*" (R. 10)*

The Secretary referred specifically to *orders,* identifying them by date and docket number; he called attention to severe penalties for violation of such *orders;* he stated that he would insist upon compliance with his *orders.* In view of the insistence upon compliance with the *orders* of January 8, 1934 and March 12, 1934, and in view of the allusion to severe penalties for the violation of such *orders,* it seems a mere play upon words for the Government now to contend that the suit was not one to enjoin, set aside, annul or suspend *an order.*

It can be of no moment to the substance of this litigation that the interlocutory injunction (R. 28) does not in terms refer to any specific order of the Secretary. The Court referred in Findings of Fact to the orders of January 8, 1934 and March 12, 1934 and stated:

> "On the other hand, the Secretary of Agriculture and the United States District Attorney for the Northern District of Illinois maintain that the schedule of rates of January 8, 1934, as supplemented by the schedule of March 12, 1934, as theretofore fixed by the Secretary of Agriculture, remained and were and are the lawful rates, notwithstanding the schedule of rates tendered to the Secretary October 19, 1935." (R. 27)

It is of no difference in actualities and in substance that the interlocutory injunction in terms restrains the Secre-

* Italics supplied here as elsewhere in this brief unless otherwise noted.

tary of Agriculture and the other defendants from interfering with the collection of charges scheduled on October 19, 1935 rather than in terms restraining the Secretary from enforcing his orders of January 8, 1934 and March 12, 1934. Either terminology would accomplish the same result, namely, restraining the Secretary from enforcing the specified and identified orders in accordance with the insistence and threats of the Secretary. In short, the schedule was filed; the Secretary insisted upon compliance with specific orders; the court enjoined the Secretary from enforcing those orders. No amount of verbiage can change that fact.

The letter of the Secretary of Agriculture to the Secretary of the Chicago Live Stock Exchange, in which the threats and insistence are made, is set forth verbatim in the petition (R. 10). The appellees alleged that the schedule of rates filed October 19, 1935 had superseded the rates prescribed by the orders of the Secretary. The prayer of the petition before the Statutory Court is

> "That upon the filing of this petition and bill and the convening of a properly constituted Court, that the Court grant an interlocutory injunction restraining and enjoining the defendants, and each of them, from enforcing or threatening to enforce the *orders* of the Secretary of Agriculture in Bureau of Animal Industry Docket 402"; (R. 13)

The prayer continues that the defendants be enjoined from interfering with the collection of the rates and charges specified in the schedule attached to the petition as Exhibit A (R. 13). There is no difference in essence between these alternative prayers. One is a negative statement, the other a positive statement. If the schedule filed was null and void, the orders of the Secretary could be enforced. If the schedule filed was lawful, the orders of the Secretary could not be enforced.

When litigants go to court because the Secretary insists

upon compliance with certain orders, and the litigants and the Statutory Court assert that those orders cannot be enforced, the suit is one to enjoin, set aside, annul or suspend an order.

The Statutory Court had jurisdiction over the subject matter of this cause since the action was one to restrain the Secretary from the enforcement of the orders of January 8, 1934 and March 12, 1934 in B. A. I. Docket No. 402.

The Contention of the Defendants in the District Court Was That the Orders of January 8, 1934 and March 12, 1934, Should Be Enforced.

The entire contention of the defendants before the Statutory Court was that the rates prescribed by the Secretary of Agriculture in 1934, by order, were still the lawful rates. The Court in summarizing the contentions of the defendants said: (R. 27)

> "On the other hand, the Secretary of Agriculture and the United States District Attorney for the Northern District of Illinois maintain that the schedule of rates of January 8, 1934, as supplemented by the schedule of March 12, 1934, as theretofore fixed by the Secretary of Agriculture, remained and were and are the lawful rates, notwithstanding the schedule of rates tendered to the Secretary October 19, 1935."

The Government's brief in the District Court is replete with defense of the orders of the Secretary of Agriculture in B. A. I. Docket 402. There are pointed out in the footnote on this page, instances of assertions in the Government's brief in the District Court showing that the Court's summary of the contention of the Government is entirely accurate.*

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*1. In its Statement of the Case, the defendants called to the attention of the court that the relief prayed was that the court "enjoin the defendants and each of them from enforcing the orders of the Secretary (which was upheld in the Acker case) and from interfering in any man-

The question in this suit, as the Government argued below, is whether when the new schedule was filed and published, did the earlier orders of the Secretary "remain and were and are the lawful rates" or whether the rates scheduled in the new tariff were the lawful rates. It makes no difference whether the proposition be put: Were the orders still in force? Or whether the proposition be put in this language: Was the newly filed schedule in force?

The Government now makes the contention that the letter of the Secretary returning the tariff to the market agencies (R. 10) was not an order such as could be enjoined, set aside, annulled or suspended. The appellees have not heretofore made, and do not now make the contention that the letter of the Secretary (R. 10) is an order. The letter threatened to enforce orders no longer enforcible; and hence the suit to restrain the enforcement of such orders.

The Argument of the Government That the Suit Is Not One to Enjoin the Enforcement of an Order Is Entirely Out of Harmony with the Government's Contention in the Second Section of Its Brief in This Court that the Published Schedule Is Illegal and Void Because It Contains Rates in Excess of Those Prescribed by Orders of the Secretary.

Under the heading "Questions Presented" the Government raises the point whether the rates of the schedule published October 19, 1935, can be lawfully collected

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ner, civil or criminal, with the collection of the rates and charges specified in the tariff published October 19, 1935" (Brief, p. 3).

2. "The orders of January 8, 1934 and March 12, 1934, pursuant to the authority of Section 310(b), expressly provided that petitioners should not publish, demand or collect any rates or charges in excess of the rates or charges prescribed" (Brief, p. 7).

3. "The fact that the orders of January 8, 1934 and March 12, 1934 were temporarily enjoined by this Court does not affect the validity of the above argument". (Brief, p. 7).

4. In the District Court, the defendants devoted an entire section of their brief to the argument that the tariff published on October 19, 1935 was illegal and void because rates had been prescribed by an order of the Secretary (Brief, p. 3, *et seq.*).

"notwithstanding that they exceed the maximum rates prescribed in the orders." (Brief, p. 3.)

Again, in its Statement of the Case, the Government refers to the refusal of the Secretary to retain the schedule of October 19, 1935, because

"he had prescribed a schedule of rates and charges",—

in other words, entered an order. (Brief, p. 5.)

In its Specification of Errors, the Government asserts that the appellees have no right to publish a schedule of rates and charges

"which does not comply with the order of the Secretary". (Brief, p. 11.)

In its Statement of Points to be relied upon (R. 34), the Government asserts that after rates have been

"prescribed by order of the Secretary",

they shall thereafter be observed, etc.

Again:

"rates prescribed shall continue in force until the further order of the Secretary".

And further,

"Inasmuch as the Secretary of Agriculture had prescribed maximum rates and charges by orders dated January 8, 1934, and March 12, 1934",

the schedule published was of no effect.

Nearly all of the assignments of Error (R. 30) are predicated upon the proposition that the orders of the Secretary of January 8, 1934 and March 12, 1934, are still in full force and effect. See particularly Assignments 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

The entire second section of the Government's Brief, covering some fifteen pages, is argument on the contention that the published schedule of rates of October 19, 1935 is void because contrary to

"rates prescribed by orders of the Secretary".

The entire substance of this lawsuit is whether the orders of the Secretary of January 8 and March 12, 1934, are still in effect. Whether such orders are in effect and enforcible depends upon the validity and lawfulness of the schedule filed on October 19, 1935. Or, stated conversely, whether the schedule filed is lawful and valid depends upon the present validity of the orders of the Secretary. The Statutory Court found the published schedule valid, lawful, and enforcible. Its injunctional order prevents the Secretary from enforcing his orders of January 8, 1934, and March 12, 1934, as prayed for in the petition.

The Secretary insisted upon the enforcement of orders no longer having any vitality. The appellees prayed that the Secretary's insistence and threats be restrained. The suit was one to enjoin the enforcement of an order.

III.

The Duties of the Appellee Market Agencies in Respect to the Filing of the Schedule of October 19, 1935, Were Performed Upon the Delivery of Such Schedule to the Secretary to Be Kept Upon File.

The arbitrary and unreasonable failure of the Secretary to perform his duty in retaining such schedule was a nugatory act. In this court for the first time, the Government contends that the schedule of rates published on October 19, 1935, was not filed with the Department of Agriculture. The Government's sole contention below was that the market agencies had no right to file a new schedule of rates. The fact of filing was not challenged. The assignments of error (R. 30) do not raise the question of the fact of filing. They challenge, as a matter of law, the right to file. But now the position taken is that the schedule of rates was not filed as a matter of fact. *The thing essential*

to a filing is the deposit of the paper with the proper officer with notice of the purpose and the intent that he should retain it. As we shall presently show *the fact that the paper is not retained by the official does not prejudice the rights of the party who has done all in his power to file the document.* That the official is derelict in his duty does not undo the act of filing.

The petition sets forth the ultimate facts in respect to the filing of the new schedule or tariff. The petition alleges that the schedule was prepared, published and submitted to the Secretary for filing in full and complete compliance with all provisions of Packers and Stockyards Act, 1921, and the General Rules and Regulations of the Secretary of Agriculture."* (Par. 13, R. 9.)

Lest the reference by the Government to Paragraph 13 of the petition leave the inference that the petition does not charge and assert that the tariff was filed, we quote from Paragraph 15 of the Petition:

> "15. The petitioners and plaintiffs allege that having made full compliance with the provisions of Packers and Stockyards Act, 1921, and with the General Rules and Regulations of the Secretary of Agriculture thereunder, in the publication and submission for filing of a schedule of just, reasonable, and non-discriminatory rates and charges, *the refusal of the Secretary to retain such schedule is void and of no effect and that such schedule is properly filed;* and that the duties of the plaintiff market agencies in respect to the filing of said schedule were performed upon the delivery of such schedule to the Secretary to be kept upon file and that the arbitrary and unreasonable failure of the Secretary to perform his duty in the retaining of such schedule is a nugatory act." (R. 11)

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* The affidavit of E. M. Hughes (R. 18) sets forth the concrete and specific facts in reference to the preparation, the posting, the publication, and the mailing of the schedule to the Department of Agriculture. No question is raised by the Government as to the proper posting and publication of the schedule; no question is raised as to the form, size and contents of the schedule: and no question is raised as to the compliance with the requirement of the Act that posting and publication must be at least 10 days before the effective date of the tariff. Consequently these questions are not discussed.

So the appellees do not contend, as the Government asserts (Brief, p. 36-7) that the schedule of rates was never actually filed. The Statutory Court found (R. 27) that the schedule of rates had been lawfully tendered to the Secretary of Agriculture and that the Secretary by arbitrarily refusing to do a ministerial act could not render the tendered schedule unlawful and ineffective.

The Government further contends that the ministerial act of the Secretary in keeping on file a schedule delivered to him is necessary in order that the public may know what the rates are; and second, that administrative officials may know what the rates are. This contention goes much further than the Packers and Stockyards Act warrants. The Act provides in Section 306 (a), Section 207 U. S. Code, that market agencies

> "shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges."

Sub-section (c) provides:

> "No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the Public filed and published as aforesaid."

Applying those provisions, the public has due notice of rates by the requirement that they be posted in the stockyards. The Secretary is given power under the Act to prescribe the form and manner in which schedules shall be prepared and arranged and posted. No complaint is made by the Government that all requirements of the Secretary were not complied with. Indeed, the Hughes affidavit (R. 18) states that the schedule in question was posted on October 17, 1935, upon the bulletin board of the Live Stock Exchange Building; that a printed copy was posted at the same time in the office of the Secretary of the Live Stock Exchange, that these places are conspicuous public places;

that, in addition, each market agency posted the schedule in his or its office. The provisions of the Act and of the regulations of the Secretary that the market agencies should print and keep open to public inspection (and it is not denied that this was done) fully apprise the public of what the rates are. Live stock shippers do not go to Washington to the office of the Secretary to determine what rates are charged; they go to the stockyards to which they send their live stock. *The purpose of filing is to give the Secretary notice. This he got.*

As to the Government's contention that the Secretary must know what the rates are—the Secretary does know. The schedule was delivered to and received by him and he acknowledged receipt thereof (R. 10). He cannot now contend that his arbitrary refusal to retain the schedule renders it impossible for him to administer the Packers and Stockyards Act.

The Government states (Brief, p. 38) that at the very heart of the act is the requirement that rates to be effective must actually be on file with the Secretary. That official cannot, by rejecting a schedule or depositing it in his wastebasket, contend that it was not filed. If, as the Government contends, the schedule must be on file, and that this requirement is

"the very heart of the Act,"

the Secretary cannot cut out the heart and then complain of his own operation.

The Failure of an Officer to Perform His Ministerial Duty When a Paper Is Delivered for Filing, Does Not Render Ineffective the Filing.

The original schedule of rates, properly subscribed by the market agencies, was delivered to the Department of Agriculture and received on October 19, 1935. (R. 19). In

his letter of October 26, 1935 (R. 10) the Secretary acknowledged the receipt of the schedule. The Secretary returned the schedule to the market agencies with the same letter (R. 10).

The duty of a party desiring to file a paper is performed with its delivery to the proper officer to be kept on file and the failure of the officer to perform his duty does not prejudice the rights of the parties.

In *Blair* v. *Cleveland C. C. & St. L. Ry. Co.*, 45 F. (2) 792, affirmed 59 F. (2) 478 (C. C. A. 7) a similar question was involved. The pertinent facts and rulings of the Court appear in the following quotation from p. 794 of 45 F. (2), the Circuit Court of Appeals adopting the same language.

> "Defendants allege also that the complaint was not filed with the Commission until the 16th day of December, 1925, beyond the time provided by the statute for filing of such complaints, and therefore came too late. However, the evidence shows that the complaint was originally received by the Commission on November 25, 1924, and remained with that Commission thereafter. *Whether the petition was then marked filed or not is immaterial; it had been deposited with the Commission, and the failure of any administrative officer to mark the same as filed does not prevent the depositing of the same with the Commission from tolling the limitations of the statute.* In *State National Bank* v. *Lowenstein*, 52 Okl. 259, 155 P. 1127, the Supreme Court of Oklahoma said that the date of filing papers is the date of depositing same with the proper custodian, and not the date they are marked filed. The filing is the actual delivery to the clerk without any regard to any action he may take."

In *Re Von Borcke*, 94 F. 352, it was held that a petition in bankruptcy is filed when it is delivered to the clerk of the bankruptcy court. The Court said:

> "It is beyond dispute that the clerk was the proper officer to receive the petition, and there is no denial of the fact that it was delivered to, and received by, him for the purpose of being kept on file. *'A paper is said*

> *to be on file when it is delivered to the proper officer to be kept on file.'* 7 Am. & Eng. Enc. Law, p. 960. The test of filing seems to be whether the officer in whose custody the paper is placed is the one entitled to retain the same."

In *Baker* v. *Reeves*, 9 N. J. Misc. 1303, 157 Atl. 174 (Supreme Court, New Jersey), a borough clerk refused to file or to mark filed a petition for election when that petition was presented. It was held that the petition was filed upon presentation, the court saying:

> "The question to be decided largely hinges on when the petition was filed. The clerk admits he received it on December 22d, but says he did not file it because he was required to investigate and satisfy himself of its validity before filing. We think the petition was filed when originally presented on December 22d. *The clerk may not have marked the petition filed but the petitioners filed it with him.*"

A similar ruling was made by the Supreme Court of Texas in *Hanover Fire Insurance Company* v. *Shrader & Rogers*, 89 Tex. 35, 33 S. W. 112, 30 L. R. A. 498, the court saying:

> "Where a paper is deposited with the Clerk of a Court for the purpose of making it a part of the records in the case, it is filed."

Further authority is found in *Gallagher* v. *Linwood*, 30 N. Mex. 211, 231 Pac. 627, 37 A. L. R. 664, in the following statement:

> "*The duty of the party desiring to file a paper is performed with its delivery to the proper officer, to be kept on file, and the failure of the officer to perform the duty does not prejudice the rights of the parties.* Neither does the withdrawal of a paper after it has once been filed cancel or render ineffective the previous filing. * * *"

In *Yates* v. *Tatum*, 60 Colo. 484, 155 P. 328, 329, the Court said:

> "The essential thing to a filing is a deposit of the

paper with the officer, with notice of the purpose and intent that he should retain it."

Again, in *Gove* v. *Armstrong*, 87 Vt. 468, 89 Atl. 868, 869, the Court said:

> "The filing party is entitled to the benefit of his act when he places the document in the custody and control of the proper officer for the purpose of filing."

In *Edwards* v. *Grand*, 121 Cal. 254, 256, 53 P. 796, the Court said:

> "An instrument is filed for record when it is deposited in the proper office with the person in charge thereof, with directions to record it."*

The Government does not distinguish between the act of the party in delivering the paper to the officer for keeping and the act of the officer in putting up the paper. When an officer is bound to keep a paper on file, the party duly filing it is not prejudiced by any wrongful act of the office after the paper is delivered. In addition to the cases cited above, we refer to others in a footnote.**

A paper is filed when it is delivered to the proper officer. It is not the clerical act of endorsing or recording or putting away the paper that is the filing but its receipt by the proper officer that constitutes a filing. It was the duty of the Secretary, upon the delivery to him of the proposed

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* We refer briefly in this footnote to definitions of the words "file", "filed" and "filing".

1. To deposit. *Harrison* v. *Clifton*, 75 Ia. 736, 740; 38 N. W. 406.
2. To deposit papers in official custody. Abbott Law Dictionary, citing many cases.
3. To deposit with the proper custodian for keeping. *In re DeWar*, 10 Mont. 426, 437, 25 P. 1026.
4. Delivered into the actual custody of the officer designated by the statute to be kept by him as a permanent record. *Norris* v. *Cross*, 25 Okl. 287, 296; 105 Pac. 1000.

** *Marlet* v. *Hinman*, 77 Wis. 136, 45 N. W. 953. A mortgage is still filed though lost or wrongfully withdrawn after delivery to the officer.

Pool v. *Poindexter*, 72 Kas. 654, 83 P. 126. A referee's report was filed on time even though after filing it was withdrawn to have it bound.

Spackman v. *Gross*, 25 S. Dak. 244, 126 N. W. 389. Wrongful removal after due filing does not affect the filing as in contemplation of law the notice is on file and in the custody of the officer.

schedule for filing, to keep and retain it. His unjustifiable action in returning the schedule and in refusing to consider it filed was nugatory. The schedule is filed in full compliance with the law. The Secretary's neglect of his duty does not prejudice the rights of the appellees.

Not a single authority is cited by the Government in opposition to appellees' contention that the refusal of the Secretary to retain the schedule delivered to him for filing was a nugatory act.

When a paper is delivered to the proper officer to be kept on file, it is in legal contemplation filed even though the officer is derelict in his duties. The exercise in sophomoric dialectics indulged in by the Government to prove that the schedule was neither filed nor on file misses the point at issue. The appellees contend that the schedule was filed and that their rights are not prejudiced by the failure of the Secretary to keep it on file. In legal contemplation that schedule has at all times been in the legal possession and custody of the Secretary of Agriculture and is on file in the Department of Agriculture. The Secretary of Agriculture, broad though his powers may be, cannot repeal a statute or render it of no vitality by the rejection of documents which he is obligated to receive and to retain.

The Packers and Stockyards Act permits the Secretary of Agriculture to reject and refuse to file a schedule tendered to him for filing only upon one condition which is expressed in Section 306(d), namely, that the schedule

> "does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful."

The Secretary did not reject the schedule on this ground but upon the ground that having once spoken in respect to rates, those rates must endure forever until he chose to speak again, if ever, regardless of changed conditions; and

upon the ground that litigation was pending over the validity of previous orders.

The cases cited both by the Government and by the appellees indicate that depending upon the surrounding facts and circumstances "filing" may mean either an act of a party in delivering a document to an official or delivery to an official followed by an act of the official placing the document "on file". The Government contends that as used in the Packers and Stockyards Act the latter meaning is intended, on the theory that the rates are to be filed not only to give notice to the Secretary, but also in order that the public may at any time know what the rates are. As has been pointed out hereinbefore, the statute makes specific provision for the public by requiring the market agencies to "keep open to public inspection at the stockyards" schedules showing the rates. The rates are filed with the Secretary in order that he may have notice of them. In such circumstances, a provision that notice be filed uses "filed" in the sense of delivered or deposited. However, even were the Act construed to require more than a deposit, the Secretary cannot assert as a defense to this suit his own wrongful act in failure to perform his duty.

The Government cites and quotes from the case of *United States* v. *Lombardo*, 241 U. S. 73 (p. 38). That case concerned the venue of a criminal prosecution under a federal statute making it a crime for the harborer of alien women to fail to file with the Commissioner General of Immigration the statement concerning such women called for by the Act. It was held that violations are committed in the District of Columbia where that official has his office and are not justiciable elsewhere on the theory that the failure to deposit the statement in the mail is the beginning of a continuing defense, since mailing is not filing. This accounts for the language employed by the Court and cited

by the Government. Obviously mere mailing is not filing. There must be delivery also.

The quotation from the *Lombardo* case abruptly terminated by the Government in its Brief (p. 38) continues:

> "Anything short of delivery would leave the filing a disputable fact."

Here there is no dispute. The schedule was received; and its receipt was acknowledged (R. 10).

From a reading of the entire opinion in the *Lombardo* case, it is clear that the holding in respect to filing means to deliver to the office indicated and to send to such office through the mail. Indeed the case is frequently cited on that exact proposition. The same question arises in relation to the filing of false income tax returns. It is held in such cases that the filing takes place upon the delivery at the office of the official required to receive it, and not in the jurisdiction where the return was mailed.*

The Government cites *United States* v. *Van Duzee*, 185 U. S. 278 (p. 38). In that case the Court does recognize a distinction between "deposit" and "filing." That distinction is not pertinent in the instant case but was in the *Van Duzee* case for the statute said "deposit"; and the Clerk with whom the deposit was made wanted a fee for "filing."

The question in *United States* v. *Davidson*, 285 F. 661 cited by the Government, page 38, involved prosecution for the removal of books "filed or deposited" with a public officer. It was held that the words are not synonymous. The decision is immaterial on any point in this case.

In *Edward Sales Co.* v. *Harris Structural Steel Co.*, 17

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* 1. *U. S.* v. *Hill, Warden*, 8 F. Supp. 469 (D. C. Pa.), aff'd. 74 F. (2) 940.

2. *Wampler* v. *Snyder, Marshall*, 66 F. (2) 195 (Ct. App. D. C.). "The filing takes place upon delivery at the office of the official required to be receive it" (196).

3. *Berlin* v. *Commissioner*, 59 F. (2) 996 (C. C. A. 2). Mailing alone is insufficient; there must also be receipt.

4. *U. S.* v. *Commerford*, 64 F. (2) 28 (C. C. A. 2).

F. (2) 155 (Government's Brief, p. 39), a foreign corporation after executing a power of attorney, instructed the Secretary of State not to accept such paper for filing. There was no intention on the part of the deliverer of the papers to have them filed. As the Court said:

> "The progress of the paper was stopped at the door of the secretary's office."

In *Lewis-Hall Iron Works* v. *Blair*, 23 F. (2) 972 (Government's Brief, p. 39), the question was whether a document had been filed in time, not whether it was filed. The language from this case quoted by the Government in its brief is not the language of the Federal Court but the language of the New York state court in reference to a particular New York statute.

The *Gubelman* case, 10 F. (2) 926, referred to in the Government's Brief at p. 40, concerned the question whether a petition in bankruptcy is filed by presenting the petition to the judge rather than by delivery to the Clerk, the latter being the officer designated by the statute to receive and keep the records of the court. It was held:

> "A paper in a case is not filed until it is deposited with the clerk of the court, for the purpose of making it a part of the records of the case."

This is precisely what was done in the instant case, the paper was filed with the proper officer for the purpose of making it a permanent record.

The state cases cited in the Government's brief (p. 40) are not pertinent. Those decisions deal with the effect of presenting a paper and its immediate withdrawal by the same party. For instance in *Chapin* v. *Kingsbury*, 135 Mass. 580, it was held that it was not a filing for a person to present a certificate to a clerk and thereafter withdraw it and keep it in his own possession.

Not a single authority is presented by the Government meeting the appellees' contention on the nub of this phase

of the controversy: The schedule was delivered; the Secretary's act in returning it was nugatory and did not render ineffective the delivery; in legal contemplation the schedule was and is filed.

The appellees performed their duty under the statute. The Secretary failed in his duty. To the prejudice of the appellees, he would now take advantage of his own remission.

Conclusion.

Under the Packers and Stockyards Act, market agencies are the primary rate makers. Their initiation of a new or amended rate schedule by filing and posting is subject to the regulatory power of the Secretary of Agriculture to suspend the operation of such schedule before its effective date, for a limited period of time, in order that a hearing may be had and a determination made of the reasonableness of the rates and charges of the schedule. The Secretary cannot refuse to retain a schedule delivered to him to give him the notice required by the Act, and then contend that the schedule is not filed.

Unless the new schedule is suspended by the order of the Secretary under the powers conferred upon him by the Packers and Stockyards Act, that schedule goes into effect by operation of law and the rates and charges prescribed are lawful and valid.

The fact that the Secretary of Agriculture had previously acted to fix rates and charges does not thereafter deprive the market agencies of the right to initiate and file lawful rates for their services in the manner provided by the Act, subject to their temporary suspension by the Secretary and to being permanently superseded by the Secretary in the manner and form prescribed by the Act.

The rejection of the schedule by the Secretary was arbitrary and unreasonable. The grounds asserted by him for his rejection that litigation was pending and that no new rates could be initiated because of his previous orders are not authorized under the Packers and Stockyards Act.

The suit was one to restrain the enforcement of the orders of the Secretary. Consequently the District Court had jurisdiction over the subject matter of this litigation and the power to enter the order for interlocutory injunction.

It is submitted that the District Court should be affirmed.

Respectfully,

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